

BREXIT FOOD SAFETY LEGISLATION AND POTENTIAL IMPLICATIONS FOR UK TRADE: THE DEVIL IN THE DETAILS

BRIEFING PAPER 37 - OCTOBER 2019

EMILY LYDGATE, CHLOE ANTHONY, ERIK MILLSTONE
UK TRADE POLICY OBSERVATORY

KEY POINTS

- The Government's approach, as set out in the EU Withdrawal Act (2018), is to transfer EU law into UK law and address any 'deficiencies' in that law (such as references to EU institutions) by secondary legislation.
- This has resulted in a large body of new food safety legislation that replaces EU legislative processes and institutions with those of the UK.
- Detaching UK food safety regulation from EU bodies, while maintaining agricultural and food systems that are no less harmful to the environment and public health, is a challenging task. This is because the UK must develop capacities, competencies and procedures that have not been required or available domestically for many years.
- It is thus implausible to suggest, as the Government argues, that new UK food safety laws constitute minor technical changes and avoid 'new legal frameworks'.
- Further, this new legislation gives ministers powers to change retained EU law without any primary legislation in the future. Only primary legislation provides Parliament with adequate time and opportunity to scrutinise and amend proposals; it also allows for wider consultation and public participation.
- There is tension between the regulatory divergence that these Statutory Instruments (SIs) permit and the imperative to maintain open borders within the UK. Empowering devolved nations to change food safety legislation could complicate trade in agricultural and food products within the UK.
- Devolved food safety standards could also undermine the UK's ability to take a unified approach to external trade negotiations.
- Powers for ministers to change retained EU law further weaken Parliament's already tenuous ability to oversee external trade agreements.

INTRODUCTION

In this Briefing Paper we examine an array of post-Brexit food safety legislation, covering pesticides, Genetically Modified Organisms (GMOs), food additives and microbiological food safety. The UK Government has committed itself to incorporating EU law unchanged as the starting point for the post-Brexit regulatory regime. However, EU institutions underpin UK food safety legislation to the extent that detaching UK law and policy making

unavoidably constitutes major legislative reform. More concerningly, our analysis suggests that the UK's post-Brexit food safety rules fall short of the level of protection currently provided by the EU: in some cases, they give ministers broad discretion to make future changes without equivalent scrutiny.

UKTPO
UK TRADE POLICY
OBSERVATORY

US
UNIVERSITY
OF SUSSEX

**CHATHAM
HOUSE**
The Royal Institute of
International Affairs

This also has implications for future patterns of trade in agricultural and food products. Within the UK, there is tension between the regulatory divergence that these Statutory Instruments (SIs) permit and the imperative to maintain open borders within the UK. Prime Minister Johnson indicated that he is keen for the UK standards to diverge from those of the EU,¹ but Scotland wishes to maintain alignment with EU regulation.² Under the new Withdrawal Agreement, if passed, Northern Ireland would continue to be bound by EU law in the areas we review and the SIs would have to be amended.³ But divergence could undermine both the UK's ability to undertake a unified approach to external trade agreements and also the maintenance of the UK's internal free movement of goods. With respect to external trade agreements, such as with the United States, extensive scope for ministers to change food safety legislation would provide a relatively clear path for a UK Prime Minister to overcome parliamentary opposition to any new trade agreements that cover agricultural and food products.

Thus further safeguards are needed in order to ensure that changes to food safety legislation benefit from adequate scrutiny, and are undertaken with a unified approach among at least Scotland, England and Wales as separate arrangements may apply for Northern Ireland. This means that devolved nations must have stronger oversight over UK external trade negotiations. Further, if the ratification of a post-Brexit trade agreement requires changes to the levels of statutory protection in the areas of food safety, the environment and animal welfare, Parliament should adopt legislation stipulating that such changes must be made through primary legislation.

PREPARING UK FOOD SAFETY LEGISLATION FOR BREXIT

The EU Withdrawal Act 2018 aims to create a “functioning statute book”⁴ on Brexit day by transferring EU law, as it stands immediately before exit day, into UK law. Extensive powers are given to UK ministers to make secondary legislation – in the form of statutory instruments (SIs) – to

correct what are characterised as ‘deficiencies’ in this ‘retained EU law’, for example where a provision no longer has any practical application by referring to an EU institution.⁵ In the Explanatory Memorandum to the Act, the Government claimed this approach was the “only appropriate solution in the circumstances”⁶ and committed to introducing primary legislation to “make major changes to policy or establish new legal frameworks.”⁷ The distinction between primary and secondary legislation is important. Primary legislation is made through the democratic processes in the UK Parliament for UK law and in the EU for EU law. Secondary or delegated legislation is made by ministers (or other bodies) under powers given to them by primary legislation. This distinction is blurred by the Government's approach to converting EU law into UK law.

Both before and after the passing of the Withdrawal Act, there was much concern about this approach to amending EU law.⁸ During the passage of the Bill, the House of Lords Constitutional Committee characterised the Withdrawal Act as a ‘tapestry of delegated powers that are breath-taking in terms of both their scope and potency’.⁹ Recently, Professor Craig has described this approach as giving “very considerable power to the executive in making regulations and limit[ing] legislative oversight.”¹⁰ Thus a key question is whether the

⁵ Ibid para 123-135. The European Union (Withdrawal Agreement) Bill would amend the Withdrawal Act so that the cut-off point is the end of the ‘implementation period’, not ‘exit day’, and the powers to correct ‘deficiencies’ extend until two years after the implementation period.

⁶ Ibid para 13

⁷ Ibid para 14

⁸ A parliamentary ‘sifting’ procedure for Brexit SIs was created: sifting committees must assess whether proposed negative SIs should be upgraded to the affirmative procedure. Affirmative statutory instruments must be debated in both Houses of Parliament. Unlike primary legislation they cannot be modified – only approved or rejected. Negative statutory instruments do not need to be debated nor actively approved by Parliament. For example, Hansard Society, *Taking back control for Brexit and beyond: delegated legislation, parliamentary scrutiny and the European Union (Withdrawal) Bill* (September 2017); Select Committee on the Constitution, *European Union (Withdrawal Bill)* (House of Lords, January 2018); House of Lords Library Briefing, *Brexit and delegated legislation* (March 2019); J Tomlinson, A Sinclair, ‘Eliminating effective scrutiny’ Parts 1, 2 and 3 <https://ukconstitutionallaw.org/2019/09/04/alexandra-sinclair-and-joie-tomlinson-eliminating-effective-scrutiny-prorogation-no-deal-brexit-and-statutory-instruments/>

⁹ House of Lords Constitution Committee Interim Report, <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf>. See also this helpful explainer: <https://publiclawforeveryone.com/2017/09/07/house-of-lords-constitution-committee-issues-interim-report-on-eu-withdrawal-bill/>

¹⁰ P Craig, ‘Constitutional principle, the rule of law and political reality: the European Union (Withdrawal) Act 2018 (2019) 82(2) The Modern Law Review 319, 345

¹ <https://www.theguardian.com/politics/2019/sep/23/johnson-hints-at-major-reforms-to-tax-and-industry-post-brexit>

² <https://news.gov.scot/news/continuity-bill-update>

³ Revised Withdrawal Agreement, 17.10.19 Article 5(4), Annex 2

⁴ European Union Withdrawal Act 2018 Explanatory Memorandum para 10

current Government is using its power merely to ensure continuity with EU law and policy or whether it is using SIs to change these key policy areas and legal frameworks. As we outline in the subsequent sections, the SIs we examine confer considerable powers to ministers to amend inherited legal frameworks by statutory instrument and our analysis suggests that the Government has interpreted its delegated powers in a way that threatens to circumvent protections provided under the Withdrawal Act¹¹ and enables major policy change through future SIs.

DEEP REGULATORY REFORM, NOT A TECHNICAL EXERCISE

The Department of Environment, Food and Rural Affairs (DEFRA) has produced 25% of all SIs, or about 100 in total. This is far more than any other government department and is indicative of the fact that approximately 80 per cent of environment, food and agriculture law and policy is made at EU level with certain powers given to Member States.¹² Detaching UK food safety regulation from EU bodies, while maintaining agricultural and food systems that are no less harmful to the environment and public health than those provided by the EU's regime, is a challenging task, even if the SIs merely transfer all the provisions of the *status quo*. This is because the UK must develop capacities, competencies and procedures that have not been required or available domestically for many years.

The UK has 'outsourced' many regulatory functions to EU bodies with statutory roles divided between Member States, the European Commission, scientific agencies and standing committees for delegated legislation, in addition to EU processes for primary legislation and enforcement. Currently EU institutions have responsibility for assessing and authorising active substances in pesticide products, setting permitted pesticides' residue levels in food, for approving new GMOs for consumption by people and livestock and for possible cultivation, and for approving food additives and disinfectant treatments for meat and

vegetables.

The delegated powers in the SIs include provision for the transfer of the functions of EU authorities to UK public authorities. But it is implausible to suggest that new UK environmental, food safety and animal welfare laws functioning without the involvement of the EU and its institutions, do not constitute 'new legal frameworks'. Nor can it be assumed that transference automatically provides the same level of consumer and environmental protection. It is necessary to establish whether UK public authorities have equivalent powers and duties to those of the EU, or whether they are enhanced or diminished. Legislative processes are connected to policy aims, they are not mere technicalities. Legislation influences how the goals of policy are specified, interpreted and pursued. It can also influence the use of scientific evidence and expertise, the possible relevance of public participation and requirements for reporting and monitoring.

WILL THE UK AGRICULTURAL AND FOOD SAFETY AND STANDARDS LEGISLATION BE FUNCTIONALLY EQUIVALENT TO THAT OF THE EU?

Here we analyse core food safety SIs vis-à-vis the original EU legislation. We examine primarily four issues, summarised in a table at the end of the section. First, does the SI itself introduce substantive policy changes. Second, does it enable the introduction of further SIs to undertake *future* policy changes (which the Government has stated that it will do only through primary legislation). Third, does it weaken the requirement to obtain independent scientific advice when approving new products or substances. Finally, does it weaken monitoring mechanisms.

It is important to note that the SIs may not capture the regulatory processes that the UK Government envisages, including the role of UK agencies. However, we proceed on the basis that, if such arrangements are not set out in UK legislation, this makes them less transparent, and more discretionary, than the parent EU legislation. In general, EU provision for 'effective enforcement' is deleted from the SIs we have reviewed. Legislation for enforcement of the specific regimes is found elsewhere in UK law and is devolved. There is provision in the SIs for a UK regime, but it is only with consent of the devolved countries, which has not been forthcoming. The UK Government re-

¹¹ The Withdrawal Act creates a novel legal category called 'direct retained principal EU law'. The SIs examined in this Briefing Paper fall into that category. Primary legislation is required to modify this law (Withdrawal Act, Section 7(2)(c)), Section 8)

¹² D Mitchell, 'EU Exit: a personal perspective from inside Government', UKELA newsletter, <https://symphony-live-new2.s3.amazonaws.com/MiRhfvCTkJU2zHYUoVHFg1UHBEOAr19HLiPAp7pgJtrIN5A2RgH2nSWpjXbynf4v/e-law%2011.14.pdf>

introduced its Environment Bill on October 15¹³ which proposes to create a new enforcement body for environmental law, the Office of Environmental Protection. The Bill, as it stands, does not apply to the food safety legislation we review.

PESTICIDE APPROVALS AND MAXIMUM RESIDUE LEVELS IN FOOD AND FEED¹⁴

EU law regulates the use of pesticides, the approval of active ingredients in pesticide products and maximum residue levels of pesticides in food and feed.¹⁵ The European Commission is responsible for the approval of active ingredients and for setting maximum residue levels. This is subject to a scrutiny procedure involving the European Food Safety Authority (EFSA), which provides scientific risk assessments, and the Standing Committee for Food Chain and Animal Health composed of representatives from Member States. The EU is divided into three zones for the authorisation of pesticide products: one Member State in a zone decides whether to grant or refuse authorisation, other Member States decide on restrictions in their territory.

The UK Government's approach is to replace the roles of EFSA, the Standing Committee and the European Commission with discretionary powers for UK ministers to amend, revoke or make pesticide regulations and issue guidance on how approval processes for new pesticides and maximum residue levels are to be carried out.¹⁶ These SIs thus create a new legal framework for pesticides by consolidating powers to a single entity in each UK nation and removing requirements for oversight and scrutiny of changes to pesticide regulation. Provision in EU law for the integration of independent scientific assessments is replaced with discretion for ministers to decide whether or not to obtain independent scientific

advice.¹⁷ The EU's provision for a penalty regime applicable to infringements of pesticide regulations, and a requirement that such a regime shall be "effective, proportionate and dissuasive", has been omitted from the SIs.¹⁸ New powers are given to UK ministers allowing them to issue or amend guidance on approvals and assessments of pesticide products and maximum residue levels, including the coordination of compliance checks, by statutory instrument rather than primary legislation.¹⁹

The UK's Health and Safety Executive (HSE), and its Chemical Regulatory Division, currently assesses pesticide products, but not their active ingredients. The Expert Committee on Pesticides advises the HSE and the Expert Committee on Pesticide Residues in Food monitors pesticide residues. Unlike the Commission, EFSA and the Standing Committee, whose roles and influence are formalised in EU legislation, the roles of the UK bodies are not specified in the Brexit SIs.

GMO AUTHORISATIONS AND LABELLING

The EU has established a legal framework for the risk assessment and authorisation of GMOs, as well as their labelling to ensure consumer choice and traceability.²⁰ In the Explanatory Memorandum to one of the Brexit SIs pertaining to GMOs, the Government states that these "simply change the identity of the bodies carrying out the specified legislative functions and convert EU procedures to UK procedures... and do not make substantive changes to policy content."²¹ However this SI transfers powers to the DEFRA Secretary of State to introduce future SIs "to make legislation in England for the purpose of: i) developing, as appropriate, technical statutory guidance for England on sampling and testing for the presence of GMOs; and ii) amending the threshold, for England, below which products containing adventitious or technically unavoidable traces of GMOs do not need to be labelled."²² Ministers are thus empowered to amend GMO law by secondary

¹³ <https://www.gov.uk/government/publications/environment-bill-2019>

¹⁴ Initial analysis of the Plant Protection Products SI was undertaken by Ffion Thomas and published in a previous UKTPO blog: C Anthony, F Thomas and E Lydgate, 'Not just a technical exercise: a look at new UK pesticides regulation,' May 2019: <http://blogs.sussex.ac.uk/uktpo/2019/05/15/not-just-a-technical-exercise-a-look-at-new-uk-pesticides-regulation>

¹⁵ https://ec.europa.eu/food/plant/pesticides_en

¹⁶ The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 SI 2019/556 (PPP SI), reg 12(6); The Pesticides (Maximum Residue Levels) (Amendment etc) (EU Exit) Regulations 2019 SI 2019/557 (MRL SI) regs 6(c)(2), 4(3) and 7(10)

¹⁷ PPP SI reg 4(29)(e); MRL SI regs 4(9), 7(6), 7(8) and 9(2)

¹⁸ PPP SI reg 12(2); MRL SI reg 7(13)

¹⁹ PPP SI reg 12(6); MRL SI reg 9(4)

²⁰ https://ec.europa.eu/food/plant/gmo/legislation_en

²¹ Exiting the European Union, Animals, Environmental Protection, Food, Intellectual Property, Department of Environment, Food and Rural Affairs (Amendment) (EU Exit) Regulations 2019 SI 2019/778, Explanatory Memorandum para 2.4

²² Ibid para 7.7

legislation, albeit after consultation with the Food Standards Agency, replacing the legislative functions of the Commission, the Standing Committee and EU reference laboratories.²³

With respect to GMO authorisations, the SI replaces:

- EFSA with food safety authorities in each UK nation;
- the Commission and the Standing Committee roles for authorisations and amending non-essential elements of the legislation with UK ministers;
- the Commission's role in administration of the regime with the FSA for submission of monitoring reports;
- the 'Community reference laboratory' with a reference laboratory or 'public analyst' at the ministers discretion.²⁴

While this SI reproduces some aspects of EU law in respect of GMOs, the checks and balances on ministerial power are being weakened.

FOOD ADDITIVE AUTHORISATIONS AND MONITORING

The EU operates a system of authorisation of food additives with conditions of use based on safety assessments, the technological need for the additive, and standards on the provision of consumer information.²⁵ Brexit SIs concerned with food additives transfer many of the provisions of the EU's regime into UK law, but they make several key changes: they revoke EU provisions requiring re-evaluations, monitoring and reporting the scale and patterns of the consumption of additives, as well as substantive changes to requirements for certain types of additives. The Brexit SI dealing with amendments to the food additives enforcement regime revokes the EU regulation on re-evaluation of approved food additives.²⁶ The Explanatory Memorandum refers to "other legislative mechanisms by which new and emerging

scientific data must be brought to the attention of the UK authorities by applicants" and refers to the statutory duty of the FSA under the Food Standards Act 1999 to monitor scientific evaluations from international assessment bodies, such as EFSA and the FAO/WHO Joint Expert Committee on Food Additives. To assess the implications of this change, one would require an analysis of how the FSA has and will monitor the information from international assessment bodies and how they are required to integrate that information into UK law and policy.

This Brexit SI also omits key provisions of the EU regime which provide for a harmonised system of monitoring consumption and use of food additives using a risk-based approach.²⁷ This change suggests that the Government intends to cease monitoring the consumption of food additives, which would be a significant change of policy. Further substantive changes to EU law have been identified. Reference to enzymes in wine-making practices is omitted in the Brexit SI without explanation,²⁸ which effectively deregulates enzymes for the UK's domestic wine-making industry. EU regulations on smoke flavourings in food are amended, omitting the stipulation that applications for authorisation and opinions from authorities should be made accessible to the public,²⁹ depriving the public of information on new food additives in smoke flavourings. This SI also confers powers to UK ministers to amend retained EU law on food additives by secondary legislation in the future.³⁰

MICRO-BIOLOGICAL FOOD SAFETY

EU legislation stipulates that only water can be used to wash animal carcasses, except for lactic acid solution that can be used on beef carcasses, providing the now infamous prohibition on 'chlorinated chicken'.³¹ If an EU Member State wishes to use another substance, they have to seek approval by the Commission which is assisted by a regulatory committee composed of Member

²³ Ibid reg 7

²⁴ The Genetically Modified Food and Feed (Amendment etc) (EU Exit) Regulations 2019 2019/705

²⁵ https://ec.europa.eu/food/safety/food_improvement_agents/additives/eu_rules_en

²⁶ The Food Additives, Flavourings, Enzymes and Extraction (EU Exit) Regulations 2019/860, reg 170 revoking Commission Regulation (EU) No 257/2010 setting up a programme for the re-evaluation of approved food additives

²⁷ Ibid reg 104 amending Regulation (EU) No 1333/2008 on food additives Art 27

²⁸ Ibid reg 73

²⁹ Ibid reg 24

³⁰ Ibid reg 52.

³¹ Regulation (EC) No. 853/2004 of the European Parliament and of the Council laying down specific hygiene rules for food of animal origin

Table 1: Summary table - Brexit SI compared with EU legislation

Statutory Instrument	Substantive policy changes introduced	Authorisation of future policy changes and new legal frameworks by statutory instrument	Weakening of requirement to obtain independent scientific assessment	Weakening of monitoring mechanisms
Pesticides (approval of active substances)	No	Yes – UK Ministers may amend, revoke or make pesticide regulations and issue guidance on approval processes for active substances	Yes – Ministers may obtain scientific advice at their discretion	Yes – requirement for immediate action in emergency situations is removed
Pesticides (Maximum Residue Levels)	No (list of products in annexes as at ‘immediately before exit day’ should be checked with new UK register)	Yes - UK Ministers may make new SIs setting evaluation principles for applications, default values for active substances, specification of concentration factors and sampling methods; UK ministers may amend or remove an entry from the MRL Register by SI	Yes – Ministers may obtain independent scientific advice at their discretion	Yes – deletion of emergency measures provision
GMOs (authorisation)	No	Yes - discretionary powers for ministers to amend application rules, authorisation rules and labelling rules, by secondary legislation	No – FSA designated to provide an opinion; though safety assessments and appointment of reference laboratories is discretionary	Yes – deletion of emergency measures provision
GMOs (labelling)	No	Yes - Ministers can change (not only lower) thresholds for labelling GMOs, amend the system to assign unique identifiers and publish technical guidance on sampling and testing	No – consultation with FSA required before amending regulations	
Food additives	Yes – prohibition of the use of additives in ‘traditional foods’ removed; reference to enzymes in wine-making removed; publication of application information on smoke flavourings omitted	Yes – Ministers may make regulations by statutory instrument to amend functional classes of food additives, labelling requirements for food colourings and the list of authorised substances.	No - Addition or removal of a substance from the list may be prescribed by ministers after seeking advice of the FSA	Yes – removal of requirement to monitor intakes of additives; revokes the EU regulation on re-evaluation of approved food additives
Microbiological food safety	Yes – easier to approve substances other than water (ie, chlorine) for carcass washes	No	No	Yes Leaving RASFF (by default)

States.³² In the Brexit SI, businesses can use any substance authorised by the UK Food Safety Authority (FSA). The SI then specifies that “those measures, designed to amend ... elements of this Regulation by, among other things, supplementing it, shall be prescribed by the appropriate authority [Government ministers].”³³ This suggests that ministers are able to prescribe changes in the substances approved to wash animal carcasses without the checks and balances provided in the EU legislation.

Brexit SIs also revoke UK participation in the EU-wide Rapid Alert System for Food and Feed (or RASFF), unless agreed with the EU.³⁴ The RASFF system permits participant Member States to receive rapid notification of unsafe and rejected consignments of food and feed products.³⁵ The system makes it far harder for dishonest traders to unload rejected consignments. The Explanatory Memorandum implicitly acknowledges that remaining in the RASFF system would be very beneficial³⁶, but if the UK leaves the EU without such an agreement remaining in RASFF will be impossible. Its loss would create an increased risk of unsafe foods and drinks coming into the UK, and EU Member States will not hear of UK rejections and may become less enthusiastic about buying UK food products. In 2018 it emerged that, if food supplies were running low and deliveries of food coming into the UK from EU Member States were delayed at Channel ports, the Government would ensure that foodstuffs would be exempted from Port Heath Inspections, to avoid any further delays.³⁷ Abandoning those checks would encourage dishonest traders to funnel into the UK consignments that had been rejected as unsafe.

TRADE IMPLICATIONS

Due to a lack of agreement on UK-wide policymaking, the Brexit SIs we review here confer powers to amend and make future laws to UK Government ministers for England, Welsh ministers for Wales, Scottish ministers for Scotland and designated authorities for Northern Ireland in the absence of a functioning executive. It is only where consent is given by the devolved nations, that the UK Government can establish a UK-wide regime. This could create complications for the UK's internal market after Brexit. For both legal and political reasons, the new regulatory framework poses an increased risk of fragmentation, with potential implications for trade within the UK (aka intra-UK trade). The new Withdrawal Agreement, if passed, would mean that Northern Ireland would remain aligned with EU law on the areas reviewed in this Briefing Paper.

It is important to note that, under existing EU rules, the UK's devolved administrations can already diverge in some cases. They maintain the ability, for example, to ban different pesticide formulations and individual GMOs for use in cultivation, even if they have been approved in other countries of the UK. However, EU rules provide a common baseline; whilst individual Member States (and the devolved UK administrations) can adopt a more restrictive approach, for example through banning a particular pesticide formulation, they cannot adopt a less restrictive one, by for example authorising an active substance that is banned at the EU level. In contrast, the devolved powers provided in the SIs do not ensure a common baseline.

With very few exceptions, EU rules provide for unimpeded trade between Member States without regulatory controls or border checks. Thus, for example, even if France and/or Austria bans the use of glyphosate-based herbicides for crop cultivation,³⁸ they are bound to accept food exports from other Member States if they comply with EU-wide Maximum Residue Levels for glyphosate. By contrast, the Brexit SIs provide the devolved administrations with broader discretion not only to make changes to the procedures for approving ‘active substances’ for pesticides, but also to amend the list of Maximum Residue Levels. Thus,

³² Article 12(2) of the legislation specifies that the substance must be approved in accordance with Articles 5 and 7 of Council Decision 1999/468/EC

³³ The Specific Food Hygiene (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/640 part 2 reg 6.

³⁴ General Food Law (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/614.

³⁵ https://ec.europa.eu/food/safety/rasff_en

³⁶ Ibid, Explanatory Memorandum para 7.8

³⁷ Chris Grayling on BBC Question Time, 15 March 2018: <https://www.bbc.co.uk/news/av/uk-politics-43425055/chris-grayling-no-post-brexit-lorry-checks-at-dover>; George Eustace Minister of State at DEFRA to the House of Lords EU Energy & Environment Committee, 28 Feb. 2018 <https://parliamentlive.tv/Event/Index/040d0036-10ec-4dab-a693-8abb5f3f2a4d>; and Lord Bridges on BBC R4 Today Programme on Saturday: <https://www.bbc.co.uk/programmes/b0b845dw> (minutes 51-57)

³⁸ <https://uk.reuters.com/article/us-france-agriculture-glyphosate/france-suggests-glyphosate-exit-could-be-even-slower-than-planned-idUKKCN1Q41S0>; E Sfiligoi, ‘Austria Votes to Ban Glyphosate’, 8 July 2019, <https://www.croplife.com/editorial/austria-votes-to-ban-glyphosate/>

it is possible that the permitted residue levels might differ between countries, particularly if approvals of active substances are not (all) UK-wide, which may have implications for trade within the UK.

Similar issues arise with respect to divergence in other areas. This raises the question of how the UK can avoid introducing internal UK regulatory controls and border checks to ensure that products comply with divergent jurisdictional requirements.³⁹ A UK-US trade deal that covered food and agricultural products would exacerbate those tensions. The US approach to food safety differs notably from that of the EU, and the USA has made clear that aligning UK rules and standards with US regulations is a priority negotiating objective. Yet Scotland has committed to introducing legislation to ensure that its regulations will continue to align with those of the EU.⁴⁰ Aside from the obvious political problems, if one or more devolved administration refuses to re-align its food safety regulations from those of the EU to comply US standards, after a US-UK Free Trade Agreement, it will complicate the flows of agricultural and food products within the UK.

Alternatively, a number of different scenarios, including the draft Withdrawal Agreement, include alignment of Northern Irish food safety regulation with that of the Irish Republic and the entire EU. The Scottish Government could argue that it too should also have this same alignment with the EU, thus further fracturing the UK's internal market and potentially requiring more intra-UK border checks.

The necessity to establish UK-wide 'common frameworks' has been agreed by the current devolved administrations to enable the UK's internal market to function after Brexit, and ensure

compliance with international obligations, but that consensus may break down, especially if the UK leaves the EU without a deal, or if English standards diverge from those of the EU. Internal fragmentation would diminish the UK Government's ability to enter into new international agreements, including those concerning trade and security. The Government's latest assessment identified 160 areas where common frameworks may be required, the majority of which relate to agriculture and the environment, where future legislation may be needed.⁴¹ Potential areas for unified regulatory frameworks include animal health and traceability, animal welfare, plant health, seeds and propagating material, food compositional standards, food hygiene, food labelling, organic farming standards, agrichemical regulations, food and feed safety as well as GMO cultivation.

The Joint Ministerial Committee (JMC) is currently the main formal mechanism for establishing agreements between the UK Government and the devolved administrations. Recommendations to improve the current JMC system, from the Common Scottish Affairs Select Committee include the creation of a sub-committee on common frameworks and improved dispute resolution.⁴² The Welsh Government has called for the creation of a UK Council of Ministers, served by an independent secretariat.⁴³ The UK Government has recognised a case for some reforms as well as the fragility of the relationship between the UK and Scottish Governments; however, it has rejected the proposal to establish a Council of Ministers, instead proposing to improve meetings and dispute resolution.⁴⁴ An action plan consisting of five phases for the establishment of common frameworks was set out in the latest framework analysis; however, the process has remained in phase 2 (detailed policy development) for 16 months.⁴⁵

³⁹ How the proposed arrangements with Northern Ireland would be implemented is unclear.

⁴⁰ The Welsh and Scottish Governments initially withheld legislative consent for the EU Withdrawal Bill due to restrictions on devolved powers in areas previously within the competence of the EU. Both legislatures introduced 'Continuity Bills', which the Welsh Government withdrew after agreement had been reached on revised provisions. The Bill was passed despite the ongoing dispute between the UK and Scottish Governments. The Scottish Government's Continuity Bill was referred to the Supreme Court, which found part of the Bill to be outside the legislative competence of the Scottish Parliament due to its proposed modification of the Scotland Act 1998 and the EUWA. The Scottish Government have subsequently abandoned the Bill and committed to introducing legislation to ensure Scots law continues to align with EU law; strengthening environmental governance, safeguarding human rights and implementing new protocols for the scrutiny of EU Exit legislation. <https://news.gov.scot/news/continuity-bill-update>

⁴¹ Joint Ministerial Committee (EU Negotiations) Communiqué (16 October 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

⁴² Scottish Affairs Committee, *The relationship between the UK and Scottish Governments* (House of Commons June 2019) HC 1586

⁴³ Welsh Government, *Securing Wales' future: Transition from the European Union to a new relationship with Europe* (2017), p 28

⁴⁴ Scottish Affairs Committee, *The relationship between the UK and Scottish Governments: Government's response to the Committee's Eighth Report* (House of Commons July 2019) HC 2532.

⁴⁵ Scottish Affairs Committee, *The future of Scottish agriculture post-Brexit* (House of Commons July 2019) HC 1637 para 53

If Brexit happens in the near future, and especially if the UK leaves without a deal, the need to address these issues will be urgent. If the UK Government weakens its food safety standards below those of the EU, Scotland and maybe Wales too, will be unwilling to follow suit, and the resultant domestic frictions will complicate the UK's attempts to conclude trade agreements internationally. Discussions about the role of devolved nations in UK trade negotiations have also been inconclusive. The default Concordat on International Relations reserves power to the UK Government, but provides for consultation with devolved nations on UK negotiating positions that fall within devolved competencies.⁴⁶ The UK Government has promised an updated concordat on the role of devolved nations in trade policy, but it is still forthcoming.⁴⁷

The UK Parliament has relatively little oversight over UK trade negotiations, as compared to the US or EU parliaments.⁴⁸ Whilst Parliament must pass primary legislation, if required, to implement a new treaty, it does not have the power to approve, reject or amend treaties made by the Government; it can only postpone their ratification. Though the House of Lords Constitution Committee recently described this as 'limited, anachronistic and inadequate',⁴⁹ the UK Government has argued that reform is not necessary, in part because of Parliament's powers to pass the legislation required to bring treaties into effect.⁵⁰ Yet some of the SIs discussed above provide extensive scope for ministers to make future changes without parliamentary scrutiny. This could provide a relatively clear path for a UK Prime Minister to overcome parliamentary opposition to a new trade agreement. For example, the US has long complained of the lengthy EU process for approving new GMOs, which the US Trade Representative

(USTR) estimates costs US agriculture \$2 billion/year.⁵¹ The SIs concerning GMOs give ministers powers to amend rules covering applications and authorisations of GMOs through future SIs.⁵² The USTR also complains of the EU's 'hazard-based' approach to banning some pesticides categorically, rather than permitting them subject to limitations on conditions of use and on residue levels.⁵³ Pesticide SIs give UK ministers the ability to amend, revoke and make regulations on how active ingredients in pesticides are authorised, and amend the maximum residue levels permitted in food 'as ministers consider appropriate', so they could abandon the more precautionary 'hazard-based' approach in favour of a more permissive 'risk-based' approach.⁵⁴

46 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

47 <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscota/2480/248002.htm>

48 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855>

49 Select Committee on the Constitution, *Parliamentary scrutiny of treaties* (House of Lords April 2019) HL 347.

50 'The framework set out reflects the fact that any implementing legislation to modify domestic law will be subject to separate parliamentary scrutiny ... before any treaty can enter into force.' 'Process for making Free Trade Agreements after the United Kingdom has left the European Union', Department for International Trade, February 2019, pp. 6-7

51 2019 National Trade Estimate Report on Foreign Trade Barriers, United States Trade Representative, 2019, p. 187

52 The Genetically Modified Food and Feed (Amendment etc) (EU Exit) Regulations 2019 2019/705

53 USTR (n 55) 190-191

54 The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 SI 2019/556; The Pesticides (Maximum Residue Levels) (Amendments etc) (EU Exit) Regulations 2019 SI 2019/557

CONCLUSION

Our analysis suggests that Brexit SIs will allow ministers to exercise considerable powers of discretion when authorising ingredients in pesticide products, amending GMO authorisations and thresholds for labelling, authorising food additives and approving substances for animal carcass washes. Ministers may issue guidance impacting substantive policy content or make new rules governing food safety by secondary legislation. That high-level of discretion exceeds powers currently vested by the EU in officials in the European Commission; they would enable ministers to lower levels of protection for public and environmental health in the UK below those that currently prevail across the EU, without full scrutiny of Parliament and with weakened requirements for the integration of scientific assessment.

Most of these SIs underwent Parliamentary debate through the so-called ‘affirmative procedure’.⁵⁵ Yet, as Baroness Smith of Basildon wrote:

*In many areas [...] bringing this legislation into UK law is essential [...] But we need to ensure that the avalanche of documents being presented to Parliament is accurate and fulfils the commitments made to maintain [...] safeguards. The fear is that the two are incompatible.*⁵⁶

Environmental organisations have also raised concerns; Peake and Chambers of Greener UK explained that ‘[d]espite stalwart efforts by many NGOs, we have only been able to analyse a small amount of legislation, while swathes have passed by without us even opening the covers.’⁵⁷ In this Briefing Paper we aim to make a small contribution to this analysis.

The SIs enable the possibility for divergence between devolved nations in some food safety standards that goes beyond what was permitted in the EU framework. As well as complicating the free movement of goods between devolved nations, this could contribute to the fragmentation of unity between Scotland, which, as we document above, has committed to maintain alignment with EU regulation, and England, which has signalled a desire to depart from EU standards in favour of a US trade agreement.⁵⁸ Further, food safety SIs themselves provide delegated powers for the Government to circumvent the legislative protections provided by primary legislation, giving more scope to the Government to override Parliamentary opposition to changes to UK food safety legislation that implement such an agreement.

⁵⁵ See above (n 8)

⁵⁶ Baroness Smith of Basildon, ‘Avalanche of Brexit Law Could Overwhelm Parliament’, *Times*(£), 31 January 2019.

⁵⁷ Libby Peake and Ruth Chambers, Greener UK, <https://greenallianceblog.org.uk/2019/05/07/beyond-the-no-deal-panic-we-need-full-scrutiny-of-brex-it-legislation>

⁵⁸ <https://www.politicshome.com/news/europe/eu-policy-agenda/agriculture/news/107053/brexit-uk-moves-scrap-%E2%80%98level-playing-field%E2%80%99-eu>; <https://unearthed.greenpeace.org/2019/10/07/brexit-liz-truss-theresa-villiers-defra/>

RECOMMENDATIONS

In light of our analysis, we make the following recommendations:

- Primary legislation should be required for reforms of legislative frameworks and major policy changes for food safety (and more generally). Only primary legislation provides Parliament with adequate time and opportunities to scrutinise and amend proposals; those procedures also allow for wider consultations and public participation.
- Scrutiny procedures for Brexit Statutory Instruments should be enhanced. One way of doing this would be to enhance recognition of the unique status of retained EU law by providing Parliament the ability to amend those instruments.
- Further devolution of powers to set food safety regulations after Brexit could result in intra-UK trade barriers and aggravate political fragmentation. To prevent this, it's essential that devolved nations have strong oversight over UK external trade negotiations, and for devolved nations to harmonise food standards where necessary for the internal UK market.
- Parliament should, at the very least, adopt legislation stipulating that, if the ratification of a post-Brexit Trade Agreement requires changes to the levels of statutory protection in the areas of food safety, the environment and animal welfare, such changes must be made through primary legislation.

ABOUT THE AUTHORS

Emily Lydgate is a lecturer in Law at the University of Sussex and a fellow of the UK Trade Policy Observatory. She recently completed an EU Marie Curie Fellowship, and holds a PhD from King's College London and an MSc (with distinction) from Oxford University. She has also consulted at the UN Environment Programme (UNEP) Economics and Trade Branch, and acted as programme officer for the Clean Trade Project.

Chloe Anthony is a ESRC-funded doctoral researcher at Sussex University focusing on UK land law and environmental governance. This research asks how law constrains or facilitates land management with environmental and social benefit and will include case studies of small-scale projects such as small farms, conservation sites and urban growing enterprises. Chloe has recently requalified in environmental law having been a tutor for sustainable land management and a freelance writer and editor. She has contributed to the UK Environmental Law Association bulletin on UK air quality law and agriculture policy and has undertaken research on Brexit implications for environmental law in light of emerging EU Exit legislation.

Erik Millstone is an Emeritus Professor of Science Policy. He has been researching the causes and consequences of innovation and technological change in the agricultural and food sectors since the mid-1970s. He has also analysed the structures and operations of the institutions responsible for setting agricultural and food policies, including safety standards. As a public intellectual, he has argued in favour of reforming those institutions and their policies to better protect public and environmental health.

FURTHER INFORMATION

This document was written by Emily Lydgate, Chloe Anthony and Erik Millstone. The authors wish to thank L. Alan Winters, UKTPO, and David Baldock, Institute for European Environmental Policy, for helpful comments.

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

For further information on this theme or the work of the UK Trade Observatory, please contact:

Professor L Alan Winters

Director

UK Trade Policy Observatory

University of Sussex, Room 280, Jubilee Building,
Falmer, BN1 9SL

Email: uktpo@sussex.ac.uk

Website: <https://blogs.sussex.ac.uk/uktpo/>

 Twitter: @uk_tpo

ISBN 978-1-912044-86-3

© UKTPO, University of Sussex, 2019

The authors assert their moral right to be identified as the authors of this publication. Readers are encouraged to reproduce material from UKTPO for their own publications, as long as they are not being sold commercially. As copyright holder, UKTPO requests due acknowledgement. For online use, we ask readers to link to the original resource on the UKTPO website.